GAF Corporation *and* General Industrial Workers Union, Local 146, Distilling, Rectifying, Wine & Allied Workers International Union, AFL-CIO. Case 22-CA-10706

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On June 30, 1982, Administrative Law Judge Harold B. Lawrence issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herein.

The Union has represented Respondent's employees at its Linden, New Jersey, plant for several decades. During that time the parties have negotiated several successive collective-bargaining agreements, referred to by the parties as Works Agreements. In addition, since approximately the mid-1940's, the parties have also negotiated separate retirement agreements, referred to as Pension Agreements. Until 1979, the Works Agreement was always negotiated separately from the Pension Agreement, resulting in two separate agreements with two different termination dates.[1] The pre-1979 Pension Agreement was a contributory retirement plan for hourly paid employees and contained the following procedure for resolving a disagreement over the calculation of pension benefits:[2]

> 13.06 (c)(1) In the event of a dispute between the Trustees and a Participant or Beneficiary over the amount of benefits payable under the Plan, the Participant or Beneficiary may file a claim for benfits by notifying the Trustees in writing of such claim. Such notification may be in any form adequate to give reasonable notice to the Trustees, shall set forth the basis of such claim and shall authorize the Trustees to conduct such examinations as may be necessary to determine the validity of the claim and to take such steps as may be necessary to facilitate the payment of any benefits to which the claimant may be entitled under the Plan.
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> (2) The Trustees shall decide whether to grant a claim within ninety (90) days of the date on which the claim is filed, unless special circumstances require a longer period of adjudication and the claimant is notified in writing of the reasons for an extension of time within such ninety (90) days period; provided, however, that no extensions shall be permitted beyond ninety (90) days after the date on which the claimant received notice of the extension of time from the Trustees. If the Trustees fail to notify the claimant of their decision to grant or deny such claim within the time specified by this Subsection (c), such claim shall be deemed to have been denied by the Trustees and the review procedure described in Subsection (3) shall become available to the claimant.
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> (3)(i) Whenever a claim for benefits is denied, written notice, prepared in a manner calculated to be understood by the claimant, shall be provided to him, setting forth the specific reasons for the denial and explaining the procedure for review of the decision made by the Trustees. If the denial is based upon submission of information insufficient to support a decision, the Trustees shall specify the information which is necessary to perfect the claim and their reasons for requiring such additional information.
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> (3)(ii) Any claimant whose claim is denied may, within sixty (60) days after his receipt of written notice of such denial, request in writing a review by the Board, the members of which shall be "named fiduciaries", within the meaning of Section 402(a) of ERISA, for the purpose of adjudicating such appeals. Such claimant or his representative may examine any Plan documents relevant to his claim and may submit issues and comments in writing. The Board shall adjudicate the claimant's appeal within sixty (60) days after its receipt of his written request for review, unless special circumstances require a longer period for adju-

[1] Since 1969, a Works Agreement was negotiated in 1970, 1972, 1974, 1977, and 1980; a Pension Agreement was negoitated in 1973, 1976, 1977, and 1979.

[2] Prior to January 1, 1975, the main effective date of the Employee Retirement Income Security Act, the parties resolved three disagreements involving both the Pension Agreement and the Works Agreement by utilizing the collective-bargaining agreement's grievance/arbitration procedure. Specifically, in grievances #1200, #1219, and #171, the Union claimed essentially that, when an employee is laid off by the Company and withdraws his pension contribution, he does not lose the recall rights provided to employees under the Works Agreement. Following hearings, an arbitrator held, on April 27, 1973, and July 22, 1974, respectively, that such an employee does not lose the Works Agreement recall rights, adding in his opinion the statement that, if such an employee is later recalled, he has the right to be covered under the Pension Agreement as a new employee.

dication and the claimant is notified in writing of the reasons for an extension of time; provided, however, that such adjudication shall be made no later than one hundred twenty (120) days after the Board's receipt of the claimant's written request for review.

(3)(iii) If the Board fails to notify the claimant of its decision with respect to his request for review within the time specified by this Subsection (c), such claim shall be deemed to have been denied on review.

(4) If the claim is denied by the Board, such decision shall be in writing, shall state specifically the reasons for the decision, shall be written in a manner calculated to be understood by the claimant and shall make specific reference to the pertinent Plan provisions upon which it is based.

(5) The procedure set forth in this Section 13.06(c) shall be interpreted in accordance with regulations promulgated by the United States Department of Labor or any successor authority regulating claims procedures for employee benefit plans.

In the negotiations for the 1979 Pension Agreement, the parties agreed to certain changes, including: a shift from a contributory plan to a noncontributory plan; a specified benefit level, for 1979, of $9.25 per month per year of credited service to age 65; a pension benefit level increase of 50 cents per year on each February 1, starting in 1980 and continuing through the expiration of the next negotiated Works Agreement; and termination of the Pension Agreement at the time the next negotiated Works Agreements terminated. All other provisions of the pre-1979 pension plan were retained. On May 14, 1979, the parties signed a memorandum summarizing the changes made from the old pension plan.

In 1980 the parties negotiated a new Works Agreement, to run from February 1, 1980, to January 31, 1983. In prior Works Agreements, article 15—entitled "Retirement Plan" and the only provision concerning pension benefits—was a general undetailed statement that the parties had agreed to a retirement plan covering bargaining unit employees. In the 1980 negotiations, the Union did not make any written proposals concerning pension benefits and no changes from the previous article 15 were made. When concordance on a new Works Agreement was reached in the morning on February 1, 1980, the parties signed a tentative agreement, stating that agreement had been reached subject to ratification by the members. Following ratification, the new Works Agreement was printed, with article 15 appearing as follows:

ARTICLE 15

RETIREMENT PLAN

Paragraph 15.01 RETIREMENT PLAN: The parties to this Agreement have agreed to a Retirement Plan covering the employees in the bargaining unit.

Retirement Benefits are:

2/1/80—$9.75 x all years of service to normal retirement age 65.

2/1/81—$10.25 x all years of service to normal retirement age 65.

2/1/82—$10.75 x all years of service to normal retirement age 65.

Further details may be found in the Summary Plan Description.

The new portion of article 15 (comprised of everything after the first sentence) was inserted unilaterally by Respondent's personnel manager, Arthur Frank, when he drew up the draft of the new Works Agreement. Frank testified that he added the language in order to advise the employees what the pension benefit level would be each year of the new Works Agreement, as previously agreed to in the Pension Agreement negotiations. When the Union and Respondent subsequently were reviewing the draft copy of the Works Agreement, the Union asked why article 15 had been changed. Frank told the Union his reasons, and, according to Frank, the Union made no objection.

The present Works Agreement also contains a grievance/arbitration provision, as follows:

ARTICLE 10

GRIEVANCE PROCEDURE

Paragraph 10.02 GRIEVANCE PARTIES AND DEFINITIONS . . . . In the event there is any grievance dispute or difference between any employee, or the Union, with the Company or vice versa, with respect to the interpretation or application of any provision of this agreement, there shall be an earnest effort made to settle or dispose such matter by negotiation between the representatives of the parties in the manner provided in this grievance procedure, upon and subject to the provisions of this agreement.

After setting out certain details for processing grievances, article 10 then provides: "Any grievances which have been negotiated through each step of the grievance procedure and have not been

adjusted, settled or disposed of, may be submitted to arbitration."

In May 1980 the Union began receiving complaints from several retired employees that, without notice, they were receiving less pension benefits than they had anticipated or had experienced a reduction in their pension benefits. The Union requested an explanation from William Burke and Arthur Frank of Respondent's personnel department, who told Union Local President Joseph Chiappino that Respondent's New York office would resolve the questions. After several months, Frank advised Chiappino to call Respondent's labor relations manager in New York. Chiappino did so, but was told the problem could not be resolved. On October 9, 1980, Chiappino filed, under the collective-bargaining agreement's procedures, a grievance stating:

> The Union protests the interpretation and resulting administration of the new Pension Plan, referred to in Article 15 of the collective bargaining agreement. Specifically, the Union protests the company's method of counting the number of years for measuring an employee's retirement benefit. Additionally, the Union protests the company's failure to correctly apply the "Grandfather" option. Both Company actions violate the conclusions of the negotiations resulting in the memorandum of agreement, adopting the new Pension Plan May 14, 1979.

In its reply denying the grievance, Respondent maintained that such pension benefit calculation disputes were only resolvable pursuant to the Pension Agreement's claims procedure (set out above):

> The complaint filed protesting the interpretation and administration of the Pension Plan is not a grievable matter under the labor agreement grievance procedure.
>
> The Pension Plan is a separate agreement outside the labor agreement, and any disagreements must be resolved in accordance with Article 13 of the Retirement Plan for hourly-paid employees of GAF Corporation. This grievance is denied.

At the unfair labor practice hearing, the parties stipulated that the issues in the grievance are as follows:

> 1. What is the proper standard for calculating the credited service or number of years to be used in computing the amount of retirement benefits payable pursuant to the Memorandum of Agreement between GAF Corporation and Local 146, dated May 14, 1979, to participants in the Retirement Plan for Hourly-Paid Employees of GAF Corporation at the GAF, Linden, New Jersey plant?
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> 2. What is the proper method of computing the amount of retirement benefits payable pursuant to the Memorandum of Agreement between GAF Corporation and Local 146, dated May 14, 1979, to participants in the Retirement Plan for Hourly-Paid Employees of GAF Corporation at the GAF, Linden, New Jersey, plant, as a result of the withdrawal of contributions by said Memorandum of Agreement?

The Administrative Law Judge concluded that Respondent violated Section 8(a)(5) of the Act by refusing to submit these issues to the grievance/arbitration procedure of the collective-bargaining agreement. Respondent has excepted to the Administrative Law Judge's rationale and conclusion. We find merit in that exception.

The Administrative Law Judge's analysis rests on essentially three points: Respondent has previously utilized the contractual grievance/arbitration provisions in resolving disputes over pension benefit calculations; Respondent cannot require pension benefit calculation disagreements to be determined under the pension plan's claims procedure because Respondent's version of that procedure violates the spirit and letter of the Employee Retirement Income Security Act (ERISA); and Respondent's refusal to arbitrate the pension benefit calculations under the contractual grievance/arbitration procedure was based on bad faith and union animus and thereby violated Section 8(a)(5). We disagree with each of those three conclusions.

First, there is no record evidence that prior pension benefit disagreements have been submitted to the contractual grievance/arbitration procedure. The only indication of prior practice is that Respondent on three occasions agreed to utilize the contractual grievance/arbitration procedure in resolving disagreements over the recall rights of laid-off employees who withdrew their pension contributions. That issue was primarily a contractual interpretation question, and involved interpretation of the Pension Agreement only peripherally. Moreover, the Administrative Law Judge indicated that Respondent agreed to hear those disputes under the contractual grievance/arbitration procedure *instead of* insisting on utilizing the claims procedure provided under the Pension Agreement. However, pension plans were not required to contain the detailed claims procedure provided in the parties' Pension Agreement until January 1, 1975, the main effective date of ERISA. It is undisputed that the only disagreements prior to the instant one involv-

ing an aspect of the Pension Agreement arose and were resolved prior to 1975. Contrary to the Administrative Law Judge's statement, there is no showing here that prior to this dispute there has been a choice of procedures between the contractual greivance/arbitration provisions and the present pension plan claims procedure provisions. Simply put, the parties' past practice does not suggest that the instant disagreement would normally be handled via the contract's grievance/arbitration provisions.

Second, while we do not at this time pass on the validity under ERISA of Respondent's pension plan claims procedure, we do note that the reasoning which the Administrative Law Judge relied on in stating that Respondent's plan violates ERISA appears to be untenable. Respondent's pension plan provides that failure to notify the claimant of the Trustees' decision means the claim shall be deemed to have been denied by the Trustees. The Administrative Law Judge maintained that this provision of the plan is "inconsistent" with other provisions of the plan and is "in clear violation" of ERISA. But this statement appears to be inaccurate: the implementing regulations issued by the Secretary of Labor specifically state that a plan can provide that "[i]f notice of the denial of a claim is not furnished . . . within a reasonable period of time, the claim shall be deemed denied." 29 CFR §2560.503-1(e)(2). The policy rationale for this seems to be to assure the claimant that delay or inaction by the trustees considering his claim will not freeze the claim indefinitely; by deeming the claim denied, the claimant is "permitted to proceed to the review stage." *Id.* The other reason for the Administrative Law Judge's stating that Respondent's plan violates ERISA was that appeals of the initial merits determination under the claims procedure are to plan's board of directors, a setup which he views as a "travesty of fair procedure." Agains, the statement apparently is not accurate: the implementing regulations issued by the Secretary of Labor specifically provide that "[e]very plan shall establish and maintain a procedure by which a claimant . . . has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary." 29 CFR §2560.503-1(g)(1). Under the parties' plan, a denied claim may be appealed to the plan's board of directors, which is named in the plan as a fiduciary for such purposes. Review by such a fiduciary of denied claims appears to be exactly what ERISA intended, according to the courts. See *Amato* v. *Bernard, et al.*, 618 F.2d 559, 569 (9th Cir. 1980); *Challenger* v. *Local Union No. 1 of the International Bridge, Structural, and Ornamental Ironworkers, AFL-CIO, et al.* [*Associated Steel Erectors of Chicago*], 619 F.2d 645, 649 (7th Cir. 1980).[3] Thus, we are not persuaded that either of the reasons on which the Administrative Law Judge relied demonstrates that Respondent's pension plan claims procedure is inconsistent with ERISA.

Third, and most important, we cannot agree that Respondent's action here was in bad faith or motivated by union animus, or that it violated Section 8(a)(5). We note at the outset that the Administrative Law Judge's basis for finding bad faith and union animus was his findings that Respondent had backtracked on its prior practice, had adopted an unfair and unreasonable review procedure, and had changed retirees' benefits without explanation. We have rejected above his analysis of Respondent's prior practice in such disputes and his reading of the fairness and reasonableness of the Pension Agreement's claims procedure. As to his last reason, changing retirees' benefits is the very question underlying the issue herein, and we will not at this time presume, as does the Administrative Law Judge, that Respondent in fact has changed those benefits or that if it did so it was seeking to undermine the Union. On the contrary, the record shows that, in declining to utilize the contractual grievance/arbitration procedure, Respondent was not simply refusing to discuss or resolve the matter. Instead, Respondent notified the Union that pension benefit calculation disputes should be resolved pursuant to the procedure which was specifically designed to handle such disputes: the pension plan claims procedure. In these circumstances, bad faith or union animus is not a warranted inference. The issue herein thus becomes whether a refusal to arbitrate under the contractual grievance/arbitration procedure one type of grievance, coupled with a willingness to have that grievance's merits evaluated under the pension plan agreement, violates Section 8(a)(5) of the Act. The Board has held that, where there is a collective-bargaining agreement containing a grievance/-arbitration clause, an employer's refusal to take all, or even most, grievances to arbitration constitutes an 8(a)(5) violation. *Paramount Potato Chip Company, Inc.*, 252 NLRB 794 (1980); *Independent Stave Company, Diversified Industries Division*, 233 NLRB 1202 (1977); *Airport Limousine Service, Inc., and Jay McNeill, Esq. as Receiver for Airport Limousine Service, Inc.*, 231 NLRB 932 (1977). However, a refusal

[3] We note that the Administrative Law Judge's conclusion of unfairness is further undermined by the ERISA provision—not mentioned by the Administrative Law Judge—for appeal of the board of directors' action to a U.S. district court. 29 U.S.C. §1132 (a) and (e); *Taylor* v. *Bakery and Confectionery Union and Industry International Welfare Fund* [*American Bakeries Company*], 455 F.Supp. 816, 817 (E.D.N.C. 1978).

to arbitrate one type of grievance is not necessarily an unfair labor practice. Where an employer refuses to arbitrate a very narrow, specifically defined grievance subject matter, the Board has not found a violation of the Act. *Whiting Roll Up Door Mfg. Corp.*, 257 NLRB 734 (1981); *Central Illinois Public Service Company*, 139 NLRB 1407 (1962); *Airport Limousine, supra* at 934. Significantly, Respondent here has not closed off all procedures agreed to by the Union and Respondent for resolving pension benefit disputes; Respondent is merely insisting on utilizing the procedure specifically required by another important labor relations statute for resolving pension benefit disputes. Under these circumstances, we find that Respondent's refusal to arbitrate pursuant to the contract's procedures the pension benefit calculations at issue herein, in light of its good-faith and reasonable explanation that the Pension Agreement's detailed pension benefit claims provision is the proper mutually negotiated procedure for resolving the dispute, did not violate Section 8(a)(5) of the Act. We will thus dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge: This case was heard before me on April 1, 1982, at Newark, New Jersey. The charge was filed on March 16, 1981, by General Industrial Workers Union, AFL-CIO, hereinafter referred to as "the Union." The complaint and notice of hearing were issued on June 1, 1981.

The complaint alleges and GAF Corporation, the Respondent, denies that Section 8(a)(5) of the National Labor Relations Act, hereinafter refered to as the Act, were violated when the Respondent refused to bargain with the Union regarding changes effected in the Retirement Plan, frequently referred to as the "pension plan," of hourly paid employees at the Respondent's plant at Linden, New Jersey.[1] Underlying this allegation is a situation in which a number of retirees questioned the monthly payments they were receiving under the pension plan and differences became apparent in the manner in which the Union and the Respondent interpreted major provisions of the plan. In order to settle these differences, the Union attempted to discuss the questions with the Respondent but was rebuffed. It filed a grievance in the name of Joseph Chiappino, its president and an employee at the Linden plant for 32 years. The Respondent, however, refused to cooperate in the processing of the grievance on the ground that the grievance procedures established under the collective-bargaining agreement were not applicable to disputes under the pension plan, which has its own provisions for the settlement of disputes.

In essence, the basic issue of whether the Respondent violated the Act depends upon whether something more than a breach of contract is involved in the event that the Respondent is incorrect in its contention that the grievance machinery is inapplicable. The Respondent must be shown, not only to be incorrect in that regard, but to have adhered to such position in order to impair or undermine the Union's position as the collective-bargaining agent of the employees in their exercise of the rights assured to them by Section 7 of the Act.

The parties were afforded full opportunity to be heard; to call, examine, and cross-examine witnesses; and to introduce relevant evidence. Post-hearing briefs have been filed by or on behalf of the General Counsel and the Respondent.

Upon the entire record and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

There is no issue as to jurisdiction. The complaint alleges, the Respondent's answer admits, and I accordingly find, that the Respondent, a Delaware corporation which manufactures and sells chemicals, building materials, and related products, and which has its principal office and plant at Linden, New Jersey, purchases and has delivered to its facility there from places outside the State of New Jersey goods and materials valued in excess of $50,000; and is, and at all material times herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The answer also admits the allegation of the complaint, and I accordingly find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act, and is the collective-bargaining representative of Respondent's employees in two units comprising all production and maintenance employees and all clerical employees, all laboratory technicians and laboratory samplers of the Linden plant but excluding leadburners, masons, watchmen and guards as defined by the National Labor Relations Board, all employees of the Personnel Relations Department, all employees of the Industrial Engineering Department, all employees of the Purchasing Department, all professional employees and all supervisors as defined in the Act.

[1] At the hearing, the General Counsel stipulated to withdraw par. 14 of the complaint, which alleges failure to bargain with respect to appointment of a new permanent arbitrator.

II. THE DISPUTE BETWEEN THE UNION AND THE RESPONDENT[2]

The current collective-bargaining agreement, known as the Works Agreement, runs from February 1, 1980, to January 31, 1983, and contains provisions for a retirement plan and provisions for the resolutions of disputes which may arise under the Works Agreement. Article 15 of the Works Agreement reads as follows:

ARTICLE 15
RETIREMENT PLAN

> Paragraph 15.01 Retirement Plan: The parties to this Agreement have agreed to a Retirement Plan covering the employees in the bargaining unit.
>
> Retirement Benefits are:
>
> 2/1/80–$9/75 x all years of service to normal retirement age 65.
> 2/1/81–$10/25 x all years of service to normal retirement age 65.
> 2/1/82–$10/75 x all years of service to normal retirement age 65.
>
> Further details may be found in the Summary Plan Description.

Article 10, entitled "Grievance Procedure" provides, in paragraph 10.02 thereof:

> In the event there is any grievance dispute or difference between any employee, or the Union, with the Company or vice versa, with respect to the interpretation or application of any provision of this agreement, there shall be an earnest effort made to settle or dispose such matter by negotiation between the representatives of the parties in the manner provided in this grievance procedure, upon and subject to the provisions of this agreement.

The procedure for the processing of grievances is then set forth and it is provided that, "Any grievances which have been negotiated through each step of the grievance procedure and have not been adjusted, settled or disposed of, may be submitted to arbitration."

When the parties "agreed to a Retirement Plan" as stated in article 15 of the Works Agreement, they did so by means of a document executed on May 14, 1979. By its terms, an existing contributory pension plan for hourly paid employees known as Pension Plan IV was changed to a noncontributory plan providing monthly benefits amounting to a stated benefit level per month per each year of credited service to age 65. The agreement was retroactive to February 1, 1979, and was for a term which was to be coterminous with that of a collective-bargaining agreement which still remained to be negotiated. The initial benefit level was $9.75 per month and an increase was provided for in each of the 3 years which were to be covered by the new collective-bargaining agreement, which is the current Works Agreement. Provision was also made for return to the participants of Plan IV of the contributions previously made by them together with interest.

The other provisions of the pension plan which were then in effect and which were to be carried over into the new plan were preserved by the following language:

> 5. All other provisions of the current Pension Plan IV will be retained including joint survivor option, contingent annuitant, disability and early retirement factors, and continued for the term or terms of the above referred collective bargaining agreements.

By statute which became effective in 1974, every employee benefit plan must contain provisions for review of benefit claims which have been denied.[3] The claims procedure as set out in the pension plan under consideration in this case, as amended and restated effective January 24, 1980,[4] provides that in the event of a dispute between the trustees and a participant or beneficiary over the amount of benefits payable under the plan, a claim may be filed in writing with the trustees. The trustees are allowed 90 days in which to make a decision, but are authorized to take another 90 days if necessary. Though they are required to notify the claimant of the reasons for rejection of his claim if they decide against him, an inconsistent provison sets forth that if they fail to notify the claimant of their decision the claim "shall be deemed to have been denied by the Trustees." Claimant's appeal is to the board of directors of the Respondent, which is allowed 60 days to render a decision, may take another 60 days if it wishes, and is also supposed to notify the claimant of any reasons for rejection of an appeal. However, if it fails to notify the claimant of its decision, the claim is deemed to have been denied on review.

The plan defines the trustee as Bankers Trust Company of New York and any additional or successor trustee of the trust fund. The Company is the plan "administrator" and administers the plan through an Administration Committee appointed by the board of directors and which serves at their pleasure. The names of its members are certified to the trustee by the board. The plan provides that the board shall interpret the provisions of the plan and certify to the trustee the amount and kind of benefits payable to participants and their beneficiaries and authorizes disbursements by the trustee for the payment of benefits. The board, as noted above, also adjudicates appeals from decisions of the Administration Committee. That committee is also given authority to compute the amount and kind of benefits payable to participants and their beneficiaries.

The description of the claims procedure contained in the Summary Plan Description prepared by the Respondent for the stated purpose of explaining the plan as amended to January 1, 1976, and in effect at the time of the 1979 negotiations,[5] is substantially the same, but

[2] The facts of the case as hereinafter set forth are a narrative composite of admissions contained in the answer of the Respondent, stipulations between counsel, information contained in the exhibits, and the undisputed and credited testimony adduced at the hearing.

[3] 29 U.S.C. § 1133.

[4] Resp. Exh. 9.

[5] Resp. Exh. 6.

there are differences. The flaccid time limitations are set forth, together with the permission to the claimant to assume that his claim or appeal has been denied if no response whatever has been received by the expiration of the stated periods. However, according to the Summary Plan Description, a claim is filed with the plan administrator, the committee appointed by the board of directors, rather than with any trustee.

The dispute between the Respondent and the Union arose some time in May 1980 when the Union began receiving complaints from retired union members that they were receiving less than they had anticipated under the plan and, in some cases, that the amounts of pensions had been reduced without explanation. There also appeared to be discrepancies between the Respondent's calculation of the amounts of the contributions and accrued interest refundable to participants under the contributory plan and their own computations of what was due them.

The Union took the matter up with the Respondent's personnel department. Inquiries were made to William Burke, the personnel supervisor of the Linden Plant, and to Arthur Frank, the personnel relations manager. In discussions which took place over the course of several months, they assured Chiappino, the union president, that the matter would be resolved at Respondent's New York office. Then Frank suggested that Chiappino call Frank A. Bowes, Respondent's labor relations manager. Bowes promised to get back to Chiappino about the problem in a couple of days, but, when he called back, it was only to say that the problems could not be resolved, apparently because higher officials of Respondent were adhering to a particular view of the plan. Chiappino understood his remarks as attributing a degree of obstinacy to those higher officials, and his testimony to that effect was not rebutted.

Early in October 1980, Chiappino filed a grievance in his own name, protesting the interpretation being placed on the plan and the manner in which it was accordingly being administered, and referring to the plan as the one referred to in article 15 of the collective-bargaining agreement.[6]

At the hearing, counsel stipulated to the following statement of the issues involved in the dispute:

> 1. What is the proper standard for calculating the credited service or number of years to be used in computing the amount of retirement benefits payable pursuant to the Memorandum of Agreement between GAF Corporation and Local 146, dated May 14, 1979, to participants in the Retirement Plan for Hourly-Paid Employees of GAF Corporation at the GAF, Linden, New Jersey plant?
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> 2. What is the proper method of computing the amount of retirement benefits payable pursuant to the Memorandum of Agreement between GAF Corporation and Local 146, dated May 14, 1979, to participants in the Retirement Plan for Hourly-Paid Employees of GAF Corporation at the GAF, Linden, New Jersey, plant, as a result of the withdrawal of contributions by said Memorandum of Agreement?

[6] This became Grievance 240.

The merits of the dispute do not concern us in this proceeding. The issues here are whether the dispute described above is a subject of mandatory negotiation and arbitration under the Works Agreement grievance procedures and whether the Respondent's refusal to resolve the dispute in accordance with those procedures amounted to a violation of Section 8(a)(5) of the Act. These issues were clearly raised by the Respondent's reply to the grievance, which was as follows:

> The complaint filed protesting the interpretation and administration of the Pension Plan is not a grievable matter under the labor agreement grievance procedure.
>
> The Pension Plan is a separate agreement outside the labor agreement, and any disagreements must be resolved in accordance with Article 13 of the Retirement Plan for hourly-paid employees of GAF Corporation. This grievance is denied.

III. CONSTRUCTION OF THE PROVISIONS OF THE WORKS AGREEMENT AND THE RETIREMENT PLAN

A. *The Works Agreement and the Pension Plan Provisions for Resolution of Disputes Are Not in Conflict and Permit Use of Either Procedure at the Sole Option of the Participant*

Under the Employees Retirement Income Security Act (ERISA),[7] employee benefit plans are required to contain procedures for the resolution of claims:

> Section 1133. Claims procedure
>
> In accordance with regulations of the Secretary, every employee benefit plan shall
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

The statute, in plain and unmistakable language, requires that a plan afford "*a* reasonable opportunity" for "*a* full and fair review" by the authority which has denied the claim. I detect nothing in the statutory provision which makes such "review" exclusive and precludes a participant from resorting to any other remedies which he may have in the event of a dispute. The review procedure outlined is referred to by the indefinite article throughout. The union plan itself couches its description of the review procedure in permissive language and fails to exclude recourse to other remedies:

[7] 29 U.S.C. §§ 1001, *et seq.*

> In the event of a dispute between the Trustees and a Participant or Beneficiary over the amount of benefits payable under the Plan, the Participant or Beneficiary *may* file a claim for benefits by notifying the Trustees in writing of such claim. Such notification may be in any form adequate to give reasonable notice to the Trustees . . . . [Emphasis supplied.]

Reading the Works Agreement and the plan together, I conclude that a participant has a choice of modalities to enforce a claim, which appears to be in line with what the statute requires.[8] To construe it otherwise would lead directly to an interpretation which would render the claims provisions of the pension plan void by reason of illegality. To the extent possible, the plan must be given a construction which presupposes the legality of the plan's provision for adjustment of disputes.[9] An examination of the claims provisions of the plan, however, makes it apparent that if they continued to be the exclusive means of settling disputes, then they violate the letter and the spirit of the law requiring inclusion of such provisions in employee benefit plans. The statute expressly mandates the furnishing of a statement of the reasons why a claim has been denied, written in a manner "calculated to be understood by the participant . . . ." If the participant is not satisfied with the result, he must be afforded a "reasonable" opportunity for "a full and fair review" of the decision denying the claim by "the appropriate named fiduciary."

Under the pension plan as described in the Summary Plan Description, the committee appointed by the Respondent's board of directors and answerable to it is the arbiter of all claims made under the plan; the plan itself seems to vest this function in a trustee which is also selected by the board. Whichever way it is, appeals lie to the board itself. This travesty of fair procedure is compounded by the inordinate leeway given to the committee (or the trustee) and to the board with respect to meeting time requirements for answering the claim; there is no real timetable for decision and, though lip service is paid to the statutory requirement that the reasons for rejecting a claim be explained in writing, the plan actually contains provisions for deeming a claim or an appeal to have been denied if no response at all is furnished. These clearly inconsistent provisions of the plan place the interpreter at a crossroads, with one path leading clearly to a finding that the provisions of the plan for settlement of claims are in clear violation of the statutory requirements. This would be the result of construing the claim procedure set forth in the plan as being the exclusive means of resolving disputes related to the question of the amount payable to a participant. The claims provisions of the plan must therefore be read as being nonexclusive.

B. *To the Extent that the Claims Settlement Provisions of the Works Agreement and the Pension Plan Are Deemed To Be Mutually Exclusive or in Conflict, the Provisions of the Works Agreement Are Controlling*

If the Works Agreement and the pension plan are read together so as to effectuate the provisions of both to the extent possible, giving in each case the ordinary and usual meaning to the language employed, the grievance machinery established by article 10 of the Works Agreement must be held to be applicable to disputes which may arise under the pension plan. By its terms, article 10 is applicable to disputes which arise under the Works Agreement. Article 15 incorporated by reference all of the provisions of the pension plan. It expressly sets out those provisions of the plan which relate to the amount of benefits payable, which by the stipulation of the parties quoted above is the gravamen of the dispute which exists between them. The legal efficacy of the provisions of article 15 to accomplish this result is not diminished by the testimony of Arthur Frank that he inserted article 15 into the Works Agreement for the information of the employees and that article 15 was not a subject of negotiation during the contract talks. It suffices that it is in the signed agreement and that the signatories were aware of its inclusion.[10]

There has been neither express nor implied waiver by the Union of any of the terms of article 10 of the Works Agreement. Certainly, in a matter as important as employees' pension rights and as important at the agreed-upon machinery for settlement of disputes in the workplace, nothing less than a clear and unequivocal waiver would suffice. It must be express and cannot be inferred.[11]

The evidence adduced at the hearing established that the pension negotiations have always been separate and apart from negotiations on the collective-bargaining agreements. That was true in the case of the current pension and collective-bargaining agreements, with the difference that this time the pension agreement was made coterminous with the collective-bargaining agreement, which was to be negotiated subsequently. The pension negotiations were concluded May 14, 1979, prior to the commencement of the collective-bargaining agreement negotiations.

It should be observed that what was negotiated was an extension and modification of the terms of the then existing pension plan, and the changes were embodied in a memorandum of agreement executed by the representatives of the Respondent and the Union. However, for the terms of the pension plan itself, resort must be had to the document issued by the Respondent in January 1980 in the form of a restated trust indenture or trust declaration. Many of its provisions, of course, embody the terms of

[8] See *Taylor* v. *Bakery and Confectionery Union and Industry International Welfare Fund [American Bakeries, Company]*, 455 F.Supp. 816 (E.D. N.C. 1978), wherein it was held that congressional intent was to require exhaustion of administrative claims procedures prior to resort to litigation. This is the normal administrative law rule. The case did not involve a question of choice or conflict of remedies but dealt solely with a situation in which a lawsuit was started prior to completion of claims procedures provided in a benefit plan, the applicability of which was not in question.

[9] Restatement of Contracts, Second, § 203(a) (1979).

[10] Frank conceded that the inclusion of art. 15 was discussed with the Union.

[11] *United States Gypsum Company*, 200 NLRB 305 (1972); *Kroehler Mfg. Co.*, 222 NLRB 1269 (1976).

agreements reached with the Union, principally matters relating to the amount of benefits and the manner of their computation. Many other provisions, however, may or may not have been the subjects of direct negotiations between the Respondent and the Union. The one which is important in the present case is the provision for the resolution of claims arising under the plan. The Respondent does not contend that the claims procedure set forth in the plan was ever negotiated with the Union; in fact, it is not even contended that the plan itself was ever shown to the Union. Chiappino disclaimed awareness of the contents of the plan, insofar as claims procedures were involved.

It is contended, however, that copies of the Summary Plan Description were furnished to the Union and mailed out to all employees involved, which would include Chiappino, who has worked at the Linden plant for 32 years. The Respondent thus argues that the Union and the employees are chargeable with notice of the contents of the plan, even though the document embodying it was prepared and issued unilaterally.

Two contentions are involved: that copies of the Summary Plan Description were handed out across the table at the pension negotiating session and that copies were mailed out to all employees in conformity with the requirements of law. The union challenges both assertions. The credible evidence convinces me that copies were in fact distributed during the negotiations and were mailed out generally to the employees, including Chiappino.[12]

I find that distribution was made, but I also must conclude that the union negotiators did not have actual knowledge of the procedure for settlement of claims outlined in the Summary Plan Description and set forth in the pension plan itself. Chiappino, of course, denied ever having seen the pension plan. There is not a scintilla of evidence that the claims provisions were ever called to his attention or to the attention of any other union negotiator by any representative of management. While the suspicion crosses my mind that over the course of time somebody must have become aware of them, even if they just read the index to the Summary Plan Description, what is involved in this case is a question of waiver and that cannot be decided on supposition. A view that the claims provisions of the pension plan supersede the grievance procedure authorized by the Works Agreement would have aroused comment, for the grievance procedure is central to the Union's conduct of business with the Respondent with respect to a wide range of matters, in which the pension plan must be included.

I also find that the Union is not chargeable with knowledge of the claims provisions of the pension plan on any theory of imputed or constructive knowledge, despite the distribution of copies of the Summary Plan Description. Such a finding would make a mockery of the rule that waiver of such important rights must be express. Considering that the matter was never negotiated, the observation of a court in similar circumstances becomes pertinent: "Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated."[13]

Consideration must also be given to the past history of the parties' resolutions of pension plan problems by resort to the grievance procedures established in the collective-bargaining agreements.

In Grievances 12000 and 1219, an arbitrator appointed pursuant to the provisions of the Works Agreement ruled that at any time before an employee's pension rights vest, he has the right, in event of a layoff, to withdraw his own contribution to the pension fund without terminating his employment; if recalled, he has the right, if he has withdrawn the contribution, to become covered under the plan again as a new employee. Such a decision cannot possibly be rendered without in effect interpreting and ruling upon the provisions of the pension plan, which govern the right to become covered.

Grivance 171 dealt primarily with the question of whether withdrawal of contributions affected recall rights under the collective-bargaining agreement, but in this instance also the arbitrator ruled on the party's right to coverage under the pension plan upon recall.

Accordingly, it must be held that recourse to the grievance machinery of the Works Agreement was available with respect to the instant dispute respecting the pension plan.

IV. ANALYSIS OF RESPONDENT'S REFUSAL TO CONSIDER THE GRIEVANCE AS A VIOLATION OF SECTION 8(A)(5)

Refusal to participate in a grievance procedure may be a simple breach of contract. The proof of whether it is in reality something more depends upon the surrounding circumstances.[14] The evidence in this case establishes that the Respondent deliberately sought to undermine the Union's position as the bargaining representative generally and specifically with respect to questions arising under the pension plan. The actions of the Respondent in changing benefit payments and in failing to issue explana-

[12] Frank testified that he went with William Burke to a storeroom to obtain copies of the Summary Plan Description for distribution at the pension negotiations and that Burke told him he had mailed out copies to the employees in July 1978. Frank testified that he presumed the legal requirement of such distribution had been complied with and also inferred that distribution had taken place from the existence of a supply of computerized mailing labels, the appearance of what seemed to be the remainder of the supply of copies, and the fact that the Respondent's general practice in such cases was to send copies to the local personnel departments for local distribution.

Frank's testimony, though based in part on hearsay and surmise, is challenged only by vague and uncertain testimony of Chiappino. Chiappino could not recall whether he had received the summary in the mail and professed not to know if other employees had received it. He "was not fully aware" of whether or not the pension plan contained a procedure for settlement of disputes arising under it, though he participated in the pension negotiations and the negotiating committee met 15 times, and though he admitted at one point having seen the summary, which has two pages on the subject. Chiappino testified variously that he had never received a copy of the Summary; that he had not seen it before the hearing; that he had seen the summary, but not the plan itself; and that a copy may have been on the table during the negotiations. I cannot credit his testimony over the comparatively lucid and detailed testimony of Frank. See *General Teamsters Local 959, State of Alaska, et al. (Northland Maintenance)*, 248 NLRB 693, fn. 2 (1980).

[13] *International Ladies' Garment Workers Union, AFL-CIO [McLoughlin Mfg. Corp.]* v. *N.L.R.B.*, 463 F.2d 907, 919 (D.C. Cir. 1972).

[14] *Chevron Oil Company*, 168 NLRB 574 (1967); *Airport Limousine Service, Inc.*, 231 NLRB 932 (1977); *California Portland Cement Company*, 103 NLRB 1375 (1953).

tions to the participants respecting the discrepancies in the figures provided to them seem inexplicably high-handed unless they are viewed in a context of union animus. The same observation may be made in connection with the unfair and unreasonable review procedure set out in the plan and the series of delays, lasting from May to October 1980, in responding to the union inquiries, when it would seem that on a matter of such keen interest to the employees a response might have been made more speedily.[15] Finally, there is the unquestionable backtracking on past practice which has just been discussed. Having previously arbitrated pension questions, the Respondent must be found to be acting in bad faith in refusing to do so in the present dispute.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The violations of the Act herein found to have been committed by the Respondent have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[15] A series of protracted delays and refusal to meet with the Union as required by contractual grievance procedures violates duty imposed by Sec. 8(d) of the Act to meet at reasonable times and confer in good faith. *United States Gypsum Company, supra* at 313.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to participate in negotiations, arbitration, and other grievance procedures provided for in the collective-bargaining agreement in effect with the Union with respect to disputes regarding questions arising under the pension plan covering hourly paid employees at the Respondent's plant at Linden, New Jersey, thus unilaterally effecting changes in the pension plan.
4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice by reason of its refusal to bargain with the Union with repect to certian changes which it effected in the pension plan covering its hourly paid employees at the Respondent's Linden, New Jersey, plant, I shall recommend that the Respondent be required to cease and desist from such conduct and that it be required, on request of the Union, to negotiate with respect to such changes and otherwise comply with the terms of the grievance procedure provided for in the collective-bargaining agreement, known as the Works Agreement, now in effect between the parties.

[Recommended Order omitted from publication.]